Coates' Canons Blog: Changes in Store for Public Guardians?

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UPDATE September 2013: H 1075 was not enacted but the guardianship provisions discussed above were transferred to S 191, which was enacted as **S.L. 2012-151**.

If a court or jury finds that a person is incapacitated, the Clerk of Superior Court may appoint one or more guardians to manage affairs and make decisions for the person. Some are guardians of the person, some are guardians of the estate, and some serve in both roles (a general guardian). Often a family member, friend or other individual serves as the guardian but the clerk also may appoint a "disinterested public agent" to serve as a person's guardian. Directors and assistant directors of the various human services agencies – departments of social services, area mental health authorities, public health departments, and county aging agencies – currently serve in this role. Sometimes the public agencies contract with a private organization, such as ARC of North Carolina, to serve as the guardian. The General Assembly is considering legislation that would require Clerks to assign all such appointments to the departments of social services. Why is this happening? What would some of the implications be?

Background

The public mental health system is in a period of transition. The local agencies involved in the system – known as "local management entities" (LMEs) – are becoming managed care organizations as required by legislation passed last year. As such, they will be authorizing and paying for mental health, substance abuse, and developmental disability services for Medicaid-eligible individuals, including those who may be incapacitated. The state used to play this role, but it will now be up to the LMEs to make these decisions and assume the financial risk related to those decisions. This new role may place LMEs in a difficult situation:

> Imagine an LME has been appointed guardian for a ward named John. John and/or the LME acting as his guardian may request access to and payment for substance abuse treatment. The LME, acting as the managed care organization, may deny the request. Then, John and/or the LME acting as his guardian may want to appeal the decision of the LME acting as the managed care organization.

This scenario creates a clear tension for the LME.

The guardianship law specifically provides that a disinterested public agent who provides "financial assistance, services, or treatment to a ward" will not be disqualified from serving as guardian. (G.S. 35A-1202). However, the law also allows a disinterested public agent to ask to be removed as guardian if the agent "believes that his role or the role of his agency in relation to the ward is such that his service as guardian would constitute a conflict of interest, or if he knows of any other reason that his service as guardian may not be in the ward's best interest…." (G.S. 35A-1213(d)). The Clerk of Superior Court has the authority to decide whether to remove a guardian.

In 2010, a Superior Court decision in Rowan County concluded that the first LME that assumed the role of a managed care organization, Piedmont Behavioral Healthcare, had a conflict of interest and therefore could not serve as a disinterested public agent and also could not contract with a private organization to serve as the guardian on the LME's behalf. News of that decision traveled fast and many people began discussing what would happen when all of the LMEs transitioned to managed care organizations.

Legislation

The N.C. Department of Health and Human Services requested legislation this session to remove LMEs from the list of possible “disinterested public agents.” The legislation, H 1075, passed the House and was on the Senate calendar for consideration today. It was withdrawn from the calendar and re-referred to the Senate Committee on Mental Health and Youth Services. The legislation is primarily focused on issues related to LME governance but the provisions related to guardianship are found in Section 12 of the bill.

If passed, the legislation would also remove all other human services agencies (i.e., public health, aging) from the definition of “disinterested public agent.” While these other agencies do not have the same potential conflicts of interest as LMEs, public health officials argued that they should not be considered an option any longer because they lack the expertise to serve effectively in the role.

Implications

If the legislation passes as currently drafted, directors and assistant directors of county departments of social services will be the only local officials authorized to serve as a disinterested public agents. Even if the legislation doesn’t pass, the LMEs across the state are transitioning to become managed care organizations and are likely to ask the Clerks of Court to remove them as guardian. Many of these transitions have already taken place or are well underway. The total number of wards being transitioned from LMEs to social services is somewhat unclear, but is probably between 1500 and 1700 individuals.

The state convened a stakeholders’ working group earlier this year to map out a transition plan for shifting wards from LMEs and the other agencies to county departments of social services. Some of the issues discussed in this working group related to funding for guardianship services, accessing services for wards with MH/DD/SA needs, and continuity of relationships for wards and guardians (including corporate guardians).

As part of the transition plan, the state has agreed to assume temporary responsibility for managing some of the guardianship contracts with private corporations. In addition, the budget (see Section 10.25 (w1)) that was approved by the General Assembly and sent to the Governor late last week included a provision that would allocate more than $4 million in Social Services Block Grant (SSBG) funding to the Divisions of Social Services and Aging and Adult Services to be used to support corporate guardianship contracts. During the stakeholder meetings, some of the discussion focused on allocating some of that money to county departments of social services to help offset the increased caseloads.

Even if some additional SSBG funding does come to counties to support guardianship services as a result of this arrangement, county departments of social services will likely need to allocate new resources to support the increased caseload. They also may need to develop more expertise in working with individuals who have a specific need for MH/DD/SA services. In some counties, LMEs would have been appointed the guardian for wards with a high level of need in those service areas so it may be relatively new territory for social services.

It will be interesting to see how this legislation progresses and to see how all of the local human services agencies adapt to the new legal landscape for public guardianship.

Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=s+191&submitButton=Go
- www.ncleg.net/Sessions/2011/Bills/House/PDF/H916v5.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_35A/GS_35A-1202.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_35A/GS_35A-1213.pdf
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=h+1075&submitButton=Go
- www.ncleg.net/Sessions/2011/Bills/House/PDF/H950v6.pdf